STATE OF MICHIGAN

COURT OF APPEALS

STEVEN S. SCHAFER,

Plaintiff-Appellee,

v

DENISE M. FEDEWA, f/k/a DENISE M. SCHAFER,

Defendant-Appellant.

UNPUBLISHED
January 28, 2003

No. 240402
Ionia Circuit Court
LC No. 98-019402-DM

Before: Sawyer, P.J., and Gage and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right an order granting plaintiff's motion to change physical custody of their son, Dylan Schafer. We reverse.

We note at the outset that our review has been complicated by the trial court's procedure which appears to be governed more by custom than by court rule. The informality of the proceedings below makes for difficult appellate review and, sadly, is grossly unfair to all parties. To the extent we can discern them from the record, we set forth the background facts and proceedings.

I

Plaintiff initiated divorce proceedings on October 28, 1998. On November 8, 1999, the trial court entered a custody order providing that plaintiff would have physical custody of the parties' son, Darin, defendant would have physical custody of their daughter Stephanie and son Dylan, and the parties would share legal custody of all three children. The court entered a consent judgment of divorce on March 3, 2000. The judgment contained the same provisions regarding custody of the children and also provided for parenting time and support.

On March 10, 2000, plaintiff filed a motion for change of custody, seeking physical custody of Dylan and Stephanie.[1] Plaintiff stated that the parties had agreed to the custody arrangement outlined in the judgment of divorce, but that defendant had not complied with its terms. Plaintiff alleged that defendant had failed to pursue counseling as ordered by the court.

[1] Only the custody of Dylan is at issue in this appeal.

Plaintiff also asserted that defendant failed to honor an agreement between them that beginning January 14, plaintiff would have Dylan with him for two weeks. Plaintiff further alleged that defendant left the children alone one evening, that she did not take Darin to his doctor appointment, that she continues to exhibit symptoms of obsessive compulsive disorder, and that Dylan indicated a desire to have more parenting time with plaintiff.

On May 18, 2000, defendant filed an answer to plaintiff's motion to change custody. Defendant denied the existence of an agreement between them that Dylan would stay with plaintiff. Defendant also denied that she had refused counseling and that she had failed to take Darin to his doctor appointment. Defendant also filed a motion requesting that plaintiff's motion be dismissed. Defendant emphasized that plaintiff filed his motion to change custody only six days after entry of the divorce judgment, and argued that plaintiff could not establish that a change of circumstances had occurred in that time to warrant a change of custody.

On May 25, 2000, plaintiff responded to defendant's motion to dismiss his motion. Plaintiff disputed that he had the burden of showing that a change of circumstances occurred in the six days following the judgment of divorce. Plaintiff argued that the arrangement in the November 8, 1999 custody order was "on a trial basis for the purpose of seeing whether or not there was a way of avoiding a protracted custody fight, and that it has therefore been between six and seven months[.]" Plaintiff maintained that:

> there never was any consideration by the Court of the custodial situation, the Court having signed a Stipulated Judgment which was entered merely for the purpose of getting the parties divorced following a long, protracted, and bitter divorce proceeding. Counsel for both the Plaintiff and Defendant knew and were well aware that the custodial situation was not etched in stone, and Michigan law clearly provides that a party can file a petition for a change of custody whenever they believe that the circumstances would warrant a change in custody.

Over the next year, it appears that the issue of custody remained unsettled in the minds of the parties and the trial court. The record contains a document entitled "Referee Recommendation & Order" entered June 1, 2000. The referee indicated that she had met with the parties and psychologist David Meyers. The referee recommended that plaintiff's motion be denied provided, with respect to Dylan, that the parties continue to work with Mr. Meyers "toward an alternating, two week custodial arrangement[.]" At the end of the document beneath the referee's signature, the court signed an order adopting the terms of the referee recommendation "subject to the respective rights of the Parties to de novo review." Plaintiff did not file an objection to the referee's recommendation.

On August 15, 2000, plaintiff filed a motion to expand parenting time. On November 6, 2000, the trial court entered another "Referee Recommendation & Order". The referee recommended, among other things, that plaintiff's weekend parenting time with Stephanie and Dylan occur on alternate weekends. On the same document, the trial court signed an order adopting the recommendations of the referee "subject to the respective rights of the Parties to de novo review." On November 14, 2000, plaintiff filed a motion for review de novo of that recommendation.

On January 17, 2001, a supplemental referee recommendation and order were entered. That order concerned primarily Stephanie and Darin, but with respect to Dylan it provided that defendant shall ensure that Dylan exercises parenting time with plaintiff. As it had done previously, the court ordered that the supplemental referee recommendations were adopted as an order of the court "subject to the respective rights of the Parties to de novo review." On January 30, 2001, plaintiff filed a motion for review de novo of the supplemental referee recommendation and order, asking that the court also entertain his previous request for review of the prior recommendation at the same time.

A hearing was scheduled for July 19, 2001.[2] At the start of the proceedings, defendant again moved to dismiss plaintiff's motion to change custody on the ground that the parties had stipulated to the custody arrangement as outlined in the divorce judgment, and plaintiff's motion did not allege a substantial change in circumstances in the six days between the entry of the divorce judgment and the filing of his motion. Defendant argued that it would be improper for the trial court to hear the motion. In response, plaintiff's counsel argued that the parties "had never agreed to finalization of the custody situation." He stated that "it is not uncommon in our circuit to get the divorce finalized and then continue fighting about child custody."

The trial court denied defendant's motion to dismiss. The court explained its practice of using a bifurcated system in divorce proceedings in this circuit:

> . . . [W]e have a custom in the Court and maybe that's causing part of the problem here that we really have – divorce cases are handled on two tracks. One is the custody/Friend of the Court matters, and the other is the divorce itself and the property matters. It's been pretty common for several years now that they don't get resolved in the same track so that you get—often have Judgments of Divorce entered based on the property settlement provision of it and the Judgment of Divorce will contain in that the existing Friend of the Court orders regarding custody, visitation, parenting time and those other—other issues. I think that it appears to me that's what's happened here. In the past the Court has, as a matter of when the petition gets filed, it relates back to the prior Order of Custody, whether it's a temporary order or not. It doesn't got [sic] back to the day of judgment because in fact the judgment is deciding the property matters, not necessarily deciding the custody issues of that time.

The court proceeded to take testimony. In a written opinion, the court found that a change of circumstances had taken place "since the November 8, 1999 custody order and since the

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[2] The record is silent regarding the reason for the considerable delay in the conduct of proceedings below. On November 14, 2000 and January 30, 2001, plaintiff filed his written objections and requests for a judicial hearing. The hearing was not held until July 19, 2001. MCR 3.215(F)(1) requires the hearing to be held "within 21 days after the written objection is filed, unless the time is extended by the court for good cause." The record is devoid of any showing of cause. Further, despite the prior order denying plaintiff's motion to change custody, the July 19, 2001 hearing addressed plaintiff's March 10, 2000 motion to change custody. For reasons unclear from the record, the trial court's written opinion was not entered until February 1, 2002, and the order changing custody was entered March 13, 2002.

judgment of Divorce and since the January 17, 2001 supplemental Friend of the Court recommendation and order." The court stated that the changed circumstances included the facts that "the children are almost one year older"[3] and that "the custody of Darin and Stephanie has been changed with the consent of the parties." The court proceeded to evaluate the best interest factors and on March 13, 2002 entered an order granting plaintiff physical custody of Dylan.

II

On appeal, defendant first argues that the trial court erred in denying her motion to dismiss plaintiff's motion to change custody. We agree.

Questions of law in custody cases are reviewed for clear legal error. *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000). We review allegations of legal error de novo. *Burba v Burba (After Remand)*, 461 Mich 637, 647; 610 NW2d 873 (2000). A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law. *Phillips*, *supra* at 20. The great weight of the evidence standard applies to all findings of fact, and an abuse of discretion standard applies to the trial court's discretionary rulings such as custody decisions. *Id.*; *Fletcher v Fletcher*, 229 Mich App 19, 24; 581 NW2d 11 (1998), citing *Fletcher v Fletcher*, 447 Mich 871, 877-878; 526 NW2d 889 (1994).

A trial court may modify a previous custody order for "proper cause shown or because of change of circumstances" if it is in the child's best interests. MCL 722.27(1)(c); *Foskett v Foskett*, 247 Mich App 1, 5; 634 NW2d 363 (2001). Reconsideration of the best interest factors of MCL 722.23 is conditioned on a determination by the trial court that the party seeking the change has demonstrated either a proper cause or a change of circumstances. MCL 722.27(1)(c); *Rossow v Aranda*, 206 Mich App 456, 458; 522 NW2d 874 (1994). Whether proper cause or a change of circumstances exists is a finding of fact which is to be affirmed unless it is against the great weight of evidence. *McCain v McCain*, 229 Mich App 123, 125; 580 NW2d 485 (1998). A party may obtain a hearing on child custody matters submitted to a referee by filing objections within twenty-one days after service of the referee's recommendation. MCL 552.507(5); MCR 3.215(E)(3)(b); *Cochrane v Brown*, 234 Mich App 129, 133; 592 NW2d 123 (1999).

As an initial matter, we reject defendant's claim that the trial court should have treated plaintiff's motion to change custody as either a motion for reconsideration or a motion for relief from judgment because it was filed only six days after the divorce judgment was entered. The passage of only six days between entry of the divorce judgment and plaintiff's motion, standing alone, does not suggest that plaintiff's motion should be treated as one for reconsideration or relief from judgment. It is entirely conceivable that circumstances may drastically change in such a short period of time to warrant a change in custody. Plaintiff's motion requested a change of custody, and the trial court properly treated it as such.

However, it is unclear on what basis the trial court proceeded with the July 19, 2001 hearing regarding physical custody of Dylan because the court had previously ruled on the

[3] At the time plaintiff filed his motion to change custody, Dylan was only six days older, but at the time the court entered its order granting a change of custody, he was two years older than he was when the previous custody order was entered.

question. The June 1, 2000 order of the court adopted the referee recommendation that plaintiff's petition to change custody be denied. Plaintiff did not file an objection to the referee's recommendation, nor did he subsequently file a new motion to change custody.[4] The court's denial of plaintiff's motion to change custody in the June 1, 2000 order appeared to resolve the matter and therefore the custody of Dylan was not properly before the court at the time the court conducted the hearing. Indeed, in its February 1, 2002 written opinion, the court acknowledged that it had denied plaintiff's motion to change custody in the June 1, 2000 order. The court stated that "[t]his order denied the Plaintiff's motion for change of custody and established a procedure to work out differences between the parties regarding visitation and other matters." Accordingly, only visitation and "other matters" remained before the court. We are puzzled that the court continued to entertain further argument and conducted a hearing regarding a change of custody in the absence of a new petition to change custody.[5]

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[4] It does not appear from the record that there ever was a hearing before the referee on plaintiff's motion to change custody. The representations of counsel on the record indicate that the court referred the matter to the referee, and that the parties met informally with the referee on several occasions. The record contains the referee's written recommendations, but no findings of fact, which the court adopted as an order. The parties have not provided this Court with transcripts of referee hearings, if any were held. MCR 3.215(C)(1) provides that "[w]ithin 14 days after receiving . . . a referral under subrule (B)(2), the referee must schedule the matter for hearing." The trial court adds to the confusion by entering orders that purport to allow review de novo of its own orders. For clarification, we remind the court of the governing procedure in MCR 3.215(E)(1):

> Within 21 days after a hearing, except for a hearing on income withholding, the referee must either make a statement of findings on the record or submit a written, signed report containing a summary of testimony and a statement of findings. In either event, the referee must make a recommendation for an order and arrange for it to be submitted to the court and the attorneys for the parties, or the parties if they are not represented by counsel. A proof of service must be filed with the court. If the recommendation for an order is approved by the court and no written objection is filed with the court clerk within 21 days after the recommendation is served on the attorneys for the parties, or the parties if they are not represented by counsel, the order will take effect.

It appears that the trial court has merged the referee recommendation with the order adopting the recommendation. On its face, the "referee recommendation and order" does not appear to afford the parties the requisite twenty one days to file objections to the recommendations before the order takes effect.

[5] Perhaps the fact that defendant does not raise this issue on appeal is indicative of the confusion fostered by the informality of proceedings below. We merely observe that the starting point of the trial court's analysis is not clear. The dissent seems satisfied with the trial court's stated intention to treat plaintiff's petition as relating back to the November 8, 1999 custody order. Even if we were to accept that the court had the authority to do so, notwithstanding the stipulated custody agreement in the March 3, 2000 divorce judgment, the court did not adhere to that date. The hearing encompassed events that occurred throughout the marriage and long after plaintiff filed his motion to change custody. The lack of a specific reference point is evident in the

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We conclude that the trial court erred in subsequently denying defendant's motion to dismiss plaintiff's motion for a change of custody. Plaintiff did not allege proper cause or that a change in circumstances occurred in the six days between the entry of the divorce judgment and the filing of his motion. None of the bases offered by plaintiff were alleged to have occurred since the divorce judgment was entered. As the party seeking the change, plaintiff bore the burden of proving proper cause or a change in circumstances occurred to allow the court to revisit the issue of custody. MCL 722.27(1)(c); *Phillips*, *supra* at 24-25. Further, the focus of the hearing was not limited to this six-day interval as it should have been, or even to events that occurred after the divorce judgment was entered. Although plaintiff acknowledged that he agreed to the custody arrangement in the judgment of divorce, much of the testimony at the hearing pertained to circumstances during the marriage. Where the party seeking to change custody has not carried the initial burden of establishing either proper cause or a change of circumstances, the trial court is not authorized by statute to revisit an otherwise valid prior custody decision and engage in a reconsideration of the statutory best interest factors. *Rossow*, *supra* at 458. Because plaintiff did not allege any factual basis to show a change in circumstances since the divorce judgment or proper cause, the trial court erred in denying defendant's motion to dismiss plaintiff's motion to change custody.[6]

Plaintiff maintains that the parties had an agreement and understanding that custody matters would be settled after the divorce was finalized. The dissent accepts plaintiff's representation as true, despite the lack of any record support for plaintiff's claim. Although in some respects the parties and the court proceeded as if custody were unsettled, the divorce judgment addressed the custody arrangement in detail and did not suggest that the custody arrangement contained therein was merely temporary. The record is devoid of any reservation of custody issues, either orally on the record or in the divorce judgment itself. Plaintiff's claim more than one year later that the parties had an understanding that custody would be determined after the divorce judgment is not only unsupported by the record at the time of the divorce and by the judgment itself, but it is also contradicted by defendant's motion to dismiss that she filed with her answer to plaintiff's motion.

We briefly address defendant's argument on appeal challenging the bifurcated system employed in divorce cases in this circuit. MCR 3.211(C) does not require that a divorce judgment include a custody determination in the same way that MCR 3.211(B) requires that a divorce judgment include a determination of the property rights of the parties. See *Yeo v Yeo*, 214 Mich App 598; 543 NW2d 62 (1995). We are aware of no authority that prohibits a court from entering a divorce judgment and reserving a custody determination until a later time. However, this was not done in the instant case. The stipulated divorce judgment set out the

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court's opinion finding changed circumstances "since the November 8, 1999 custody order and since the judgment of Divorce and since the January 17, 2001 supplemental Friend of the Court recommendation and order."

[6] The dissent does not address the trial court's denial of defendant's motion to dismiss plaintiff's motion to change custody, which is defendant's first issue on appeal. Rather, the dissent begins its analysis with a review of the court's assessment of the best interest factors in MCL 722.23, without addressing the threshold question whether a change of circumstances or proper cause has been shown to permit the court to reconsider the best interest factors.

custody arrangement in detail. It seems that the confusion stems not from the court's use of a "two-track" system, but rather from the conflict between the divorce judgment which clearly addresses custody and the subsequent statements of the court and counsel regarding the customary means of resolving custody disputes and the parties' misunderstandings of the effect of the divorce judgment. The trial court's response to defense counsel's question regarding the date after which plaintiff would be required to show changed circumstances illustrates the problem:

> *THE COURT:* The Court is looking at the petition he filed to relate back to that order saying because of the two-track system we're doing, that we look at the petition to relate back to the November 8th – for a change in circumstances from that time until the time of filing of the petition.
>
> *Defense Counsel:* Okay, not the Judgment of Divorce, the November of '99 one?
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> *THE COURT:* No, because the Judgment of Divorce – most times when we have these matters the Judgment of Divorce just encompasses the existing custody and visitation orders and with the matter being heard, if they want to hear it, after that.

The use of a bifurcated system which would postpone a determination of custody issues contradicts, and seems to render meaningless, the custody provisions contained in the divorce judgment in this case.

We look to the judgment of divorce, and not to the oral representations of counsel and the trial court. A court speaks through its judgments, orders, and decrees, not its oral statements or written opinions. *Tiedman v Tiedman*, 400 Mich 571, 576; 255 NW2d 632 (1977); *Boggerty v Wilson*, 160 Mich App 514, 530; 408 NW2d 809 (1987). Notwithstanding the statements of counsel and the court, the judgment of divorce on its face appears to resolve the issue of custody and is detailed in its provisions. Therefore, plaintiff's motion to change custody is subject to the applicable standards set by statute.[7]

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[7] Of course, custody arrangements are always subject to modification for good cause. MCL 722.27(1)(c). The custody provisions in the divorce judgment do not preclude plaintiff from bringing a petition to modify the custody arrangement at any time. However, a properly filed petition is subject to the statutory requirement that plaintiff demonstrate proper cause or a change in circumstances has occurred since the entry of the judgment to warrant a change in custody. We are cognizant that the primary concern in any custody dispute is the best interest of the child. Even assuming, as the dissent suggests, that this concern "overrides" some of the procedural problems in this case, we believe that they do not override the moving party's obligation to demonstrate a change in circumstances or proper cause and the courts' obligation to operate within the established statutory framework for resolving custody disputes.

In light of our holding, we need not address defendant's remaining issues on appeal.

Reversed.

/s/ David H. Sawyer
/s/ Michael J. Talbot